

Competition law and policy in Japan

by Toshiko Murata

INTRODUCTION

Japanese competition law is centered around the Anti-monopoly Act (AMA) which was enacted in 1947. But during its rather long history, its status as the fundamental law for an economic order has not been secured. If we look at the year, 1947, it was the time when Japan was occupied by the US after WWII. As a result of this, the AMA was modeled after US antitrust law and its content seems similar to the US style, but its enforcement over the years has been different. The concept “competition is good” was unfamiliar to Japanese society at that time, and so it took time for society to accept this act.

This article looks at the Act’s history, its content, and its enforcement.

HISTORY OF THE AMA

Background to the Act

Modernization of Japan

In order to really understand the background of the AMA, we need to go back to the modernization of Japan, which started around 1868. At that time, the Japanese government was surprised to see the high level of technology and power in Europe and the US, and became worried about colonization. So, it adopted “catch up” policies which introduced many new laws, mainly modeled on the German example. The government introduced technology from foreign countries and helped industry grow.

Before and during World War II

Before and during WWII, Japanese economy had two main problems in terms of its competition policy. The first problem was that of concentration. A handful of conglomerated groups called “zaibatsu” controlled the whole Japanese economy. The Zaibatsu groups grew by cooperating with the government and used holding companies to control a lot of large and influential companies in important industries.

The second problem was that of cartels. In order to control economic activity leading up to the war, the government did not only permit cartels among competitors, but used them to their own advantage by creating private controlling associations in each industry and letting them control the products and prices of their members.

Occupation policy after World War II

After WWII Allied forces occupied Japan, they carried out their occupation policy of “economic democratization”. This policy included drastic reform. Land was taken away from landlords and given to the farmers, and trade unions were legalized. In industry, zaibatsu groups were dismantled, several big companies were subdivided, and private controlling associations were dissolved. After all those structural measures, the Anti-monopoly Act was enacted to keep the democratic economy in order.

Development

The AMA lost ground for the first half of its history, and then it gathered momentum and is actively enforced today. Its history can be divided into four periods: retreat, reassessment, amendment and active enforcement.

Retreat

During the first few years, the AMA was enforced actively because the occupation forces were still in Japan, but the situation changed with Japan’s independence. The recovery of industry was given top priority, and for this purpose the government used the old familiar technique. The AMA was amended to allow depression cartels and rationalization cartels. Even in the time of depression, output cartels found it difficult to succeed because of coordination problems and cheating. Therefore, the MITI (Ministry of International Trade and Industry) advised producers to reduce their output, and in practice coordinated cartels. In the 1960s, Japanese business faced the threat of liberalization of capital and trade. In order to compete with big foreign companies, government encouraged many mergers.

In this climate, the competition authority could not play an active role in cartel and merger control. However, the competition authority found its way in the field of consumer protection and protection of small companies from their big trading partners.

Reassessment

The AMA was presented with two opportunities to further the interests of consumers in general. The first chance was the so-called *False Beef Can* case in 1960. A consumer bought a can of cooked beef, and found a fly inside. She complained to the company but it didn’t respond properly. She then complained to the authority. It

was found that the beef can contained not only a fly but also whale meat instead of beef. Similar beef cans were checked and revealed to contain whale or horse meat. The public realised that misrepresentation was widespread, and this caused an outcry from consumers. There was no appropriate law to regulate such conduct: however, the AMA could apply, because it prohibits unfair trade practices, which include deceptive enticement like misrepresentation. Consumers started to realize that the AMA could protect them from disreputable marketing methods.

The second chance was through recognition and action against cartels. In the early 1970s an oil crisis triggered hyperinflation, which became a social issue. It was revealed that the culprit of the inflation was not only the oil crisis, but also secret cartels among competitors. The public then realized that cartels were detrimental to consumers and the economy, and government and public started to look at the AMA as a potential weapon against cartels and inflations.

Amendment to strengthen

The AMA's long period of declining influence was finally reversed. Because of the above two events, and the increase of market concentration, consumers and small business (and agriculture) started supporting the AMA. Then in 1977, for the first time in its history, the AMA was amended to strengthen its content and enforcement. The main improvement was the introduction of a surcharge system against cartels (which is explained in more detail later). However, the enforcement was found to be inadequate: there was only one criminal case before 1990, which concerned oil cartels among oil refining companies during the oil crisis.

Pressure for active enforcement

In 1989–90, Japan and the US government had a discussion whose main purpose was to open the Japanese market and uncover potential obstacles. The Japanese government promised actively to enforce the AMA. After that, the government started to use criminal sanctions more, but the level of prosecution was only about one every two years.

CONTENT OF THE AMA

Purpose

The purpose of the Act is described in section 1, and is to promote free and fair competition. Through this, it purports to to “promote democratic and wholesome development of the national economy” and to “assure the interest of consumers in general”.

Prohibited conduct

In order to achieve this purpose, the AMA prohibits certain conduct by undertakings and controlling concentrations, such as those resulting from mergers (I have not covered controlling concentrations in this article).

There are three main types of prohibited conduct: private monopolization, cartels and unfair trade practices.

Private monopolization (sections 2(5),3)

The prohibition of private monopolization is similar to Article EC82 (abuse of dominant position). There are mainly two tests for this category. The first test is its market effect; whether it substantially restrains competition (in any particular field of trade). The second test is conduct; whether it controls or excludes other entrepreneurs. The third test is whether it is contrary to the public interest. I will consider the third test later, in cartels.

If you compare this with Article EC82, a dominant position is not required. However, in enforcement, private monopolization is applied only to undertakings with a high market share. And in fact, there are only a few cases of private monopolization. This is because most exclusionary conduct or abusive conduct is covered by the third category, unfair trade practices whose requirements are much easier to meet.

Unreasonable restraint of trade (Cartel) (sections 2(6),3)

In the AMA, cartels are caught under *unreasonable restraint of trade*. Its prohibition is similar to Article EC81 (collusion). There are mainly two tests. The first test is its market effect, and is the same as private monopolization. The second test is the type of conduct, and whether it is a contract or agreement. The third test is the same as private monopolization – whether it is contrary to the public interest.

Compared with Article EC81, there are some differences. First, there is no Article EC81 (2), and cartel contracts are not automatically void. Second, there is no Article EC81 (3). However there is the third test; “contrary to the public interest”. If you interpret this key phrase broadly as one of justification, many cartels which restrict competition can be allowed (case law does not allow such wide interpretation.) Third, the case law has interpreted that “unreasonable restraint of trade” covers horizontal restraints only. Most vertical restraint is covered by the unfair trade practices.

Unfair trade practices (sections 2(9),19)

The first test of “unfair” is its effect and whether it tends to impede fair competition. As I mentioned, this test is much easier than the test for the other two categories. The second test is for types of conduct. The AMA defines broad types of conduct and leaves the detail to be designated by the competition authority. Unfair trade practices include many types of conduct, which will be explained in more detail later.

Let us go back to the first test. Which types of conduct can be said to “impede fair competition”? This test does not necessarily require market definition, and there are three aspects to it:

1. Conduct which impedes fair competition by impeding free competition (eg RPM, territorial restriction, price discrimination, and refusal to deal).
2. Conduct which impedes fair competition through unfair competitive methods (eg predatory pricing, tying, and deceptive enticement by misrepresentation or excessive premiums).
3. Conduct which impedes fair competition because it impedes the basic structure of free competition (eg abuse of dominant bargaining position).

ENFORCEMENT OF THE AMA

In order to enforce the AMA, the Japan Fair Trade Commission (JFTC) was created and modeled after the US FTC. (It has one chairperson and four commissioners. It carries out its duty independently. Its decisions are made by majority vote. The commission has three powers; administrative power, quasi-judicial power, and quasi-legislative power).

The AMA has three enforcement measures; administrative measures by the JFTC, civil remedies, and criminal sanctions. The feature of the enforcement in Japan is that the JFTC plays the central role. It takes not only administrative measures but also plays an important role in civil remedies and criminal sanctions.

Administrative measures

Administrative measures are the most important measures. The JFTC can issue two types of orders. The first is the “cease and desist” order, to stop illegal conducts.

The second is the “payment of surcharge” order. This order can be issued only in cases of certain cartels and is used usually after the first order. The amount of surcharge is calculated by multiplying the sale of the product in issue by certain rates. In cases of big manufacturers, the rate is 6%. (In cases of small companies, or wholesaler or retailers lower rates are applied). The central feature of the surcharge system in Japan is that the JFTC does not have discretion to reduce or increase the amount according to how cooperative the breaching company is, or how severe the cartel is. There is a reason for this.

As I explained earlier, the surcharge system was introduced in 1977. At that time, the AMA already contained claims for damages and a fine as a criminal sanction. The surcharge should not be a sanction because constitutional law prohibits double jeopardy. Therefore, the nature of the surcharge was planned solely to repeal illegally gained profits made by cartels, and the upper rate of the surcharge was set at 6%. The amount of surcharge is just an assumed profit (maybe much smaller than the real profit) and not high enough to restrain cartels effectively. The surcharge is not therefore, a sanction, as the amount does not change according to such factors as whether the

company is a market leader, or whether it co-operates with investigators.

Procedures and appeal

As a formal procedure, the JFTC makes decisions to issue the above orders after the hearing procedure, which is similar to a trial. The decisions of the commission are subject to judicial review by the Tokyo High Court and can possibly reach as high as the Supreme Court. The third party does not have standing to appeal the decision of the JFTC.

Civil remedies

There are two types of remedies within the AMA; damage claims and actions for injunction.

Damages (section 25)

The AMA has a special damage claim system, which reduces the burden of proof. The plaintiff does not have to prove willful conduct or negligence, and therefore the defendants cannot escape from liability by claiming that they are not willful or negligent. Such special damage claims are only available after the JFTC has made a decision.

This system appears to help private damages suits, but in reality has not been very supportive. One reason is that courts adopted very stringent requirements concerning proof of damage and causation, and in the case of the oil cartels mentioned earlier, consumers brought actions but failed.

Recently, there have been two pieces of good news. First, the civil case procedure act was amended to ease the proof of damages. Thanks to this, a victim of a cartel won their damage suit. Second, the JFTC announced its new policy to help civil damage suits, so damage claims can be expected to increase in the future.

Injunction (section 24)

In 2000, the AMA was amended to introduce a new injunction system. Persons who suffer or probably suffer “substantial damage” (from breach of the AMA) can take an action for an injunction. The important point here is that plaintiffs do not have to wait until the JFTC takes action.

However, there are limits for this injunction system. First, an injunction is limited only for unfair trade practices, such as refusal to deal, predatory pricing and tying. Second, consumer groups are not given standing. Thus, the effectiveness of the injunction system is not clear so far.

Criminal sanctions?

Cartels and private monopolization are subject to the following three categories of criminal sanctions:

1. Individuals can face a fine up to £25,000 pounds and imprisonment for up to three years.

2. Companies can face a fine up to £500,000.
3. Company representatives can face a fine up to £25,000 pounds if they knew illegal conduct took place and did not take any measures to stop it.

The third has never been used, because it is very difficult to prove that the representative had knowledge of the illegal conducts. However, there is one non-criminal sanction, which applies to the representatives. If you are the president of very big company, you might be a candidate for the Medal of Honor from the government. But, if your company breaches the AMA, you cannot win the honor for several years and your term will finish.

Criminal sanctions are available only when the JFTC makes an accusation. The prosecutor then decides whether to make an indictment or not.

Issue of the surcharge system

The main problem facing enforcement is the surcharge system, which has a number of problems and is the subject of reform.

First, there has recently been a case which used all three enforcement measures. In the *Seal* cartel case, the

companies paid a fine, restitution (substantially similar to damages) and a surcharge. In such cases the companies pay most of the illegally gained profit in restitution. Therefore, for practical purposes, the surcharge functions as a sanction. When the surcharge system was created, damages claims and criminal sanctions were not used, but the situation has changed.

Second, the present surcharge system does not have a leniency program and the amount is not high enough to deter cartels. Third, the surcharge can apply only to certain cartels and not to private monopolization, which is as bad as a cartel. Therefore, the government is currently considering the reform of the surcharge system. ㊦

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